Def. Doc. No. 3037

DEFENSE SUMMATION

on

PERSONAL RESPONSIBILITY

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DEFENSE SUMMATION ON PERSONAL RESPONSIBILITY

Mr. President and Members of the Tribunal,

1. The object of this summation is to analyze the alleged criminal responsibility of all the defendants from the point of view of modern criminal law.

The Chief Prosecutor said in his opening statement as follows:

"Since the usual definition of murder in civilized countries is the intentional killing of a human being without legal justification, we should perhaps see what constitutes legal justification. This justification is usually limited to the defense of one's person or property or, perhaps, in the case of an execution, that he was merely carrying out the order of a properly constituted court." (1)

The question of legal justification is, of course, important, but such can be understood only when the question of "intention" is taken into consideration at the same time. Unfortunately, however, the Chief Prosecutor left the latter entirely out of his discourse, as if the criminality of the defendants' intention is taken for granted.

2. Even in the case where an act has come within the purview of certain conditions defining a crime and was done without any cause of legal justification, mentioned by the Chief Prosecutor, still the person who committed the act will incur no criminal responsibility, unless

(1) Tr. 425

three more requirements are fulfilled: that is, (a) he has been mentally competent to take such responsibility, (b) the act was committed with criminal intent (as a rule) or through criminal negligence (in exceptional cases), and (c) there existed, at the time of commission of the act, a possibility of expecting him not to commit such an act. I shall hereunder consider the said three requirements seriatim.

3. In reference to the defendants in the present trial, it will not be necessary to dwell upon their mental competency to take responsibility for their acts, except the case of OKAWA. There is no doubt that each of them has had "the competency to discern the illegality of his conduct or to act according to his discernment of illegality of the conduct".(2)

4. As to criminal intent and negligence, Professor Sayer deplores in his treatise on "Mens Rea":

"It is almost hopeless to give an accurate definition of the term mens rea because of the diversity of its construction in judicial decisions and theories."(3)

In view of this remark, I wish, first of all, to determine the basis of my argument by briefly reviewing legislations of those countries which have adopted the most up-to-date principles of criminal law.

5. Article 38 of the present Japanese Criminal Code provides in Paragraph 1:

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(2) Article 10, Swiss Criminal Code
(3) Sayer: "Mens Rea", Harvard Law Review, Vol. 45, 1931-32, p. 974.

"No act done without criminal intent shall be punished, except in the case where it is otherwise provided specifically by law."

Paragraph 3 of the same article reads:

"Ignorance of law cannot be invoked to establish the absence of criminal intent, but the punishment may be reduced in consideration of the extenuating circumstances."

The said Paragraph 1 is the codification of the maxim: "Actus non facit reum nisi mens sit rea", while the said Paragraph 3 is the embodiment of the saying: "Ignorantia juris non excusat." Moreover, the said → Paragraph 1 is derived from Article 77, Paragraph 1, of the old Japanese Criminal Code, which was almost similar in the wording,(4) and the said Paragraph 3 is a modification of Article 77, Paragraph 4, of the old code.(5) Since Article 77 of the old code provided in the case where he committed a crime without knowing the facts which constitute the crime", the term "criminal intent" has been construed by the majority of judicial decisions as "knowledge of facts which constitute a crime".

(4) "No act done without criminal intent shall be punished, except in the case where its punishment is provided specifically by law or regulations."

(5) "Ignorance of law or regulations cannot be invoked to establish the absence of criminal intent."

6. According to this interpretation, criminal intent is established where the person in question knew the facts which constituted the crime, i. e., his act and the natural and probable consequence thereof, but, when such knowledge is once proved, it is not necessary to further enquire whether or not he was aware of the illegality of his act. As the result of this interpretation also, mistake of fact is sharply divided from mistake of law. In the former case, criminal intent is entirely precluded. In the latter case, while mistake of criminal law does not preclude criminal intent, mistake of non-criminal law does so preclude, on the presumption that mistake of non-criminal law is nothing but mistake of fact. For illustration of this interpretation, a judgment of the Japanese Supreme Court is quoted as follows:

> "When a person destroyed the seal and markings of attachment affixed to an attached object in the mistaken belief that the attachment had lost its effect by his payment of debt, his intention to commit the crime (of Article 96 of the Criminal Code) is precluded."(6)

7. In the above-mentioned case, there is no doubt that the act was committed by mistake of civil law. Can we, however, so hastily conclude as to say that the act was done without knowledge of the facts which constitute the crime? Is it not more natural to construe that criminal intent is precluded, not because mistake of civil law has brought about ignorance of facts which constitute the

(6) Judgment of Feb. 22, 1926, by the Second Criminal Division, Supreme Court. Report, Criminal, Vol. V, p. 97.

crime, but because, in spite of the offender's knowledge of such facts, mistake of civil law has amounted to ignorance of illegality of his act?

8. Professor Hafter of the Zurich University, after discussing the theories and judicial decisions in Switzerland upon the subject of criminal intent, remarks as follows:

"Illegality is the essential element in the conception of crime. It does not matter whether it is expressly stated as legal constituent of each crime. If we couple this principle with another that criminal intent must be related with every factor of a crime, we cannot but arrive at the conclusion that the criminal must be conscious of the illegality of his action. To deny this is to surrender to the tyranical force which belittles mistake of law. In this connection, a brief explanation will be required. Consciousness of illegality of one's act does not mean the knowledge of his acting contrary to certain provisions of law. - - - - It is quite unnecessary that he should be aware of any particular norm of criminal law. It is necessary, however, that <u>his idea as layman, i. e., his sense of law, should inform him</u> that he is committing an act which is not permissible. - - - - Only when a person has such consciousness of illegality, may he be adjudged guilty on the ground that his act was done with criminal intent. The axiom of no punishment without responsibility

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demands this. Though it will seldom happen in the commission of a crime, in the case where a person had no knowledge of his act being contrary to his duty and not permissible and where the impossibility of having such knowledge is actually proved in consideration of his whole personality, it is a shame to adjudge him guilty, however light the punishment may be."(7)

9. Professor Hafter further contends:

"All attempts are futile to make distinction between mistake of fact and mistake of law. Much more so, between mistake of criminal law and mistake of non-criminal law. It is too difficult to draw a line between the two. From the viewpoint of criminal responsibility, mistake as to the criminal nature of one's act must be taken into consideration. In the case where an abductor did not know the age of the abducted girl, or where a person was not aware of the fact that he was harboring a murderer, or where a school teacher mistakenly exercised his right of discipline, - - - - no criminal intent should be recognized, if his bona fides is proved beyond reasonable doubt. On the other hand, we need not consider his mistake in the punishability of his act, or its legal nature, e.g. whether larceny or embezzlement, or the degree or conditions of punishment, or the existence of certain requirements of legal proceedings, etc."(8)

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(7) Hafter: "Lehrbuch des Schweizerischen Strafrechts", allg. teil, 1926, S. 117, S. 118.
(8) Hafter: Op. Cit. S. 184.

10. The above-mentioned case of abduction will be illustrated by R. V. Prince of 1875 in England. Prince had abducted from her father a girl under the age of sixteen; but in the belief, on adequate grounds, that she was eighteen, in which case the abduction would not have been a crime. The great majority of the judges agreed, however, in the view that "an intention to do anything that is wrong legally", even as a mere civil tort and not as a crime at all, would be a sufficient mens rea. Some judges went even beyond this; laying down a view, according to which there is a sufficient mens rea wherever there is "an intention to do anything that is wrong morally", even though legally it be quite innocent, both criminally and civilly.(9) Although Professor Sayer criticizes this case as having confused and unsettled the law more than any other upon the subject,(10) can we not interpret the said opinions of the English judges as their recognition of the knowledge of illegality to be the essential factor of mens rea?

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(9) Kenny: "Outlines of Criminal Law", 14th Ed., 1933, pp. 41-42.

(10) Sayer: Op. Cit. p. 1025

11. This idea will become more clear, if we look into the question of negligence. According to Professor Kenny, "the mere fact that there was some degree of negligence on the parent's part will not suffice. There must be a wicked negligence, a negligence so great as to satisfy a jury that the prisoner did not care whether the child died or not."(11)

He remarks further that "when motorists are sued in civil actions for negligence, the verdict is usually against them, but is rarely so in prosecutions of them for manslaughter. There must be a wicked negligence — such disregard for the life and safety of others as to deserve punishment."(11)

It follows, therefore, that negligence, punishable under criminal law, is not a simple carelessness, but must be wicked or blameworthy. In this sense, it may be said that the difference between criminal intent and criminal negligence is only a matter of degree of knowledge of illegality.

12. In my submission, the above-mentioned views of the English jurists are the positive side of a principle of the modern criminal law, that is to say, that mens rea should be determined by the presence of knowledge of illegality; while the said opinion expressed by Professor Hafter forms the negative side of the same principle, that is to say, that mens rea will be precluded in the absence of knowledge of illegality. If we read again, with this consideration in mind, the maxim of Ignorantia juris non excusat,(12) it will mean: (a) a person shall be punished for his act, if he was aware of the illegality of his act, in spite of his ignorance of law, (b) even in the case where he was not aware of the illegality of his act, he shall be punished, if he was negligent in having been unaware of the illegality

(11) Kenny: Op. Cit., p. 122
(12) Japanese Criminal Code, Article 38, Paragraph 3.

of his act and if such negligence is blameworthy, and (c) in the case where he was not negligent or, if negligent, not sufficiently blameworthy for such negligence in having been unaware of the illegality of his act, he shall not be punished, even though he had knowledge of the facts which constitute a crime.

13. Professor Radin remarks as follows:

"Mens rea in English law was never held to mean that ignorance of criminal law was an excuse. In the German common law down to the end of the 19th century, the rule was error juris non excusat. Under the influence of Feuerbach, the excuse was later actually admitted for several decades with the result that there set in a sharp reaction, which has restored the old rule in modern German law. In France, exceptions are made in very unusual circumstances. The Norwegian Code, however, provides that where there is a mistake of law the punishment may be decreased or even abrogated altogether. In fact, many of the continental theorists are in favor of abrogating or at least modifying the generally prevailing old rule, and some of the recent drafts of penal codes provide for milder punishment."(13)

14. In stating this, Professor Radin must have had in mind the draft of the Swiss Criminal Code in 1918. However, almost every legislation of the later date provides that mistake of illegality may be the ground not only for the reduction but for the exemption of punishment. It is true that Article 18 of the said Swiss draft recognized only mitigation in the case of mistake of illegality.(14) But

(13) Radin: "Intent" in Seligman's Encyclopaedia of the Social Sciences, Vol. VIII, p. 129.

(14) "If a person committed a crime in the belief that he had a right to do the act, punishment may be reduced."

the actual Criminal Code, promulgated in 1937, provides in Article 20 as follows:

"Where a person committed an act with a good reason to believe that he had a right to do the act, punishment may be reduced or remitted at the discretion of the judge."(15)

15. Looking back to the Chinese Tentative Criminal Law which existed prior to 1928, Article 13, Paragraph 2, provided as follows:

"Ignorance of law cannot be invoked to establish the absence of criminal intent, but punishment may be mitigated by one or two degrees in consideration of the extenuating circumstances."

The above was amended by the old Criminal Code of 1928, Article 28 of which read as follows:

"Ignorance of law shall not discharge any person from criminal responsibility; provided however that punishment may be reduced by one half in consideration of the extenuating circumstances."

Now, the present Chinese Criminal Code, which has come into force since 1935, provides in Article 16 as follows:

"Ignorance of law shall not discharge any person from criminal responsibility; provided however that punishment may be reduced in consideration of the extenuating circumstances. In the case where a person believed that his act was permissible by law and where there was a good reason for him so to believe, punishment may be remitted."

(15) This Article 20 of the Swiss Criminal Code follows literally the provisions of Article 17 of the Swiss Military Ciminal Law of 1927.

The above changes in Chinese law clearly demonstrate the gradual transition from the formal interpretation of ignorance of law to the real understanding of the principle of non-cognizance of illegality.

16. The reason why I have in the above discussed at length this rather elementary principle of criminal law is because Professor Kenny maintains that a mistake of law, even though inevitable, is not allowed in England afford any excuse for crime. He states:

"The utmost effect it can ever have is that it may occasionally, like drunkenness, rebut the existence of the peculiar form of mens rea which some particular kind of crime may require. Thus larceny can only be committed when a thing is stolen without even the appearance of right to take it; and, accordingly, a bona fide and reasonable mistake, even though it be of law — like that of a woman who gleans corn in a village where it is the practice to do so — will afford a sufficient defense. Similarly a mortgagor who, under an invalid but bona fide claim of right, damages the fixtures in the house which he has mortgaged, will not be guilty of 'malicious' damage. Apart, however, from such exceptional offences, the rule which ignores mistakes of law is applied with rigour."(16)

17. On the other hand, he remarks:

"But I know of no reported decision which extends this rule to mere municipal bye-laws. Both in England and in the United States (Porter v. Waring, 69 N.Y. 250) a

(16) Kenny: Op. Cit. pp. 69-70

judge would require legal proof of a bye-law before enforcing it. Should the law attribute to ordinary people a greater legal knowledge than to the judge?"(17)

Admitting that this Honorable Tribunal might take judicial notice of the fact that there is a large body of international law, known at different times and by different writers as the "common law" or "general law" or "natural law" of international law,(18) I respectfully submit that it is a law less clear and definite than a national law and that acts in contravention of international law are deemed by any national law not sufficiently blameworthy to incur criminal responsibility, except in a few cases. According to Professor Kenny, it is expounded as follows:

"The student must bear in mind that, though it is sometimes said that 'International Law is part of the laws of England,' this is true only in that loose historical sense in which the same is also said of Christianity. But an indictment will not be for not loving your neighbor as yourself. Equally little will it be for trading in contraband or war, or for the running of a blockade. Both these acts are vitiated by International Law with the penalties of confiscation; but neither of them constitutes any offence against the laws of England, or is even sufficient unlawful to render void a contract connected with it."(19)

18. The above submission will be opposed by the contention that international law is a law sui juris and can punish any act, which it deems fit upon the ground entirely

(17) Kenny: Op. Cit. p. 68, Note 4
(18) Mr. Keenan, Opening Statement, T. 405-6
(19) Kenny: Op. Cit. pp. 324-325. As to the question of trading with the enemy, see P. 335, Note 1.

different from any national law. It is said, however, by Lord Wright and quoted by the Chief Prosecutor as follows:

"In my earlier essay I pleaded to have it recognis- that International Law was the product, however imperfec of that sense of right and wrong, of the instincts of justice and the humanity which are the common heritage of all civilized nations. This has been called for many ages 'Natrual Law'; perhaps in modern days it is simpler and truer merely to refer to it as flowing from the instinctive sense of right and wrong possessed by all decent men, or to describe it as derived from the principles common to all civilized nations. This is, or ought to be, the ultimate basis of all law."(20)

In other words, even though "the source of International Law must * * * be sought elsewhere than in the acts of a national law-making authority,"(20) it must have a foundation in the instinctive sense of right and wrong, common to all law. It must not be the law of the mighty or the conqueror.

19. The heretofore accepted definition of "international law" is that it governs relations between independent States.(21) It has been a matter of common sense to understand that: "Public international law is the body of rules which control the conduct of independent States in their relations with each other. It is altogether different in its nature from law in the narrower sense of the word, namely, law capable of judicial enforcement, for that

(20) T. 407-8
(21) The S. S. Lotus (France v. Turkey), Permanent Court of International Justice, Sept. 7, 1927, Cited in Hackworth: "Digest of International Law," 1940, Vol. I, p. 2.

implies a force superior to both the litigants or disputants; and as independent States have no recognized common superior, the rules by which their conduct is governed are incapable of enforcement except by war."(22)

Even the Chief Prosecutor admits that "the personal liability of these high ranking civil officials is one of the most important, and perhaps the only new question under international law to be presented to this Tribunal

20. According to the Chief Prosecutor, it is said that the prosecution will "show that each and every one of the accused named in this indictment played an important part in these unlawful proceedings; that they acted with full knowledge of Japan's treaty obligations and of the fact that their acts were criminal."(24) In my submission, here lies the fallacy of his contention, for knowledge of treaty obligations is entirely a different question from knowledge of criminality of their acts. No modern national law would punish an individual for any breach of contract, whether be it intentional or unintentional. No international law has ever criminally punished an individual for any breach of treaties except perhaps in cases of the so-called convential war crimes and pirates. Even then, the prosecution admits that "the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders."(25)

(22) Byrne's Law Dictionary, 1923, p. 487
(23) T. 435
(24) T. 422
(25) T. 39,007

21. Evidence adduced either by the prosecution or by the defense has definitely established the fact that all the defendants did their level best to carry out whatever treaty obligations they had to deal with in their respective capacities, not because they were aware of their criminal responsibility for not doing so, but becau they wanted to keep the sanctity of the treaty itself. Any breach of treaty obligations, alleged by the prosecution, has been proved to have resulted from inevitable but unforeseen circumstances. All acts of the defendants, as indicted before this Tribunal, were done in pursuance of the laws of their country. If Professor is right in saying that "it is necessary that his idea as layman, i.e., his sense of law, should inform him that he is committing an act which is not permissible,"(26) how could the defendants have been informed by their sense of law that their acts were not permissible under international law, at the same time when their very sense of law was telling them that their acts were permissible under their national law?

22. The learned judges in the McNaughton's case stated as follows:

"We are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time

(26) See Para. 9 supra

of committing such crime that he was acting contrary to law: by which expression we understand to mean the law of the land."(27) If there was any conflict between the law of the land and international law, the judges would not hesitate to answer the superiority of the former. So would the defendants. But what I wish to emphasize is that not only the defendants had legal justification for their acts under their national law, but they honestly reasonably believed that their acts were justified under international law.

23. The prosecution contends, in its summation upon conspiracy, as follows:

"If he was in office at that time, allowed his scruples to be overruled, and continued in office, we submit that quite clearly he should be convicted, and that in a moral point of view his case is at least as bad as that of one who had no such scruples."(28)

And further it maintains, in its summation upon individual responsibility, in particular, of a cabinet minister, that:

"He always had alternative of resigning instead of casting his affirmative vote for, or expressing his acquiescence in an aggressive measure. If he did not resign despite his personal convictions because he felt it more important that he or the Cabinet continue in office, he is legally just as responsible and morally more responsible than an all-out proponent of the aggressive policy, since he deliberately chose to approve the policy

(27) McNaughton's Case, 1843, cited in Wilshere: "Leading Cases on Criminal Law," 3rd Ed., 1935, p. 31.
(28) T. 39,057

with full cognizance and conviction of its evil."(29)

24. Such an accusation misses the mark entirely, so far as the defendants are concerned. During the period of th indictment, i.e., from January 1928 to September 1945, 1 Cabinets rose and fell, the average life of a Cabinet being only one year. How can we expect any consistent national policy, either aggressive or defensive, under these circumstances? The trouble with the defendants not that they clung to their prominent posts despite th personal convictions, but that they forsook such posts too readily, because of their sensitiveness to political responsibility, to carry out their policies. Did or should their sense of law inform them, at the time of their resignation, that they would be also responsible criminally under international law, if they did not resign? No sane man, even the most learned scholar of international law, would dream of such a fantasy, but the will be the only conclusion to be drawn from the logic of the prosecution. Whatever may be the case, the evidence adduced before the Tribunal has proved that the defendant believed that their acts were permissible both by the law of their land and by the laws of nations and that they h good reasons so to believe. Even if they are to be adjudged by an ex post facto law as criminally liable u international law, their punishment should be remitted, should the principle embodied in the aforesaid Article 1 of the Chinese Criminal Code(30) be adopted.

(29) T. 40,554-5
(30) See Para. 15, supra

25. Leaving aside for a moment the question of international law, I should like to discuss briefly the principle of criminal responsibility, which requires the existence, at the time of commission of an alleged offence, of a possibility of expecting the offender not to commit such an act. Article 34 of the Swiss Criminal Code of 1937 is the best illustration of this principle and provides as follows:

> "No person shall be punished for his act done in order to avert any impending and otherwise unavoidable danger to his right, in particular, to life, body, liberty, honor or property, if he is not responsible for the occurrence of such danger and if it is impossible to expect him to abandon his endangered right in view of the circumstances".

26. Article 37 of the Japanese Criminal Code reads as follows:

> "No person shall be punished for his act inevitably done in order to avert any impending danger to his or any other person's life, body, liberty or property, if the evil arising out of his act does not exceed the degree of evil which he tried to avert; provided however that punishment as to the act in excess of such degree may be reduced or remitted in consideration of the extenuating circumstances".

The underlying thought of this provision is the same as that of the Swiss Code above referred to, i.e., criminal responsibility shall not be attributed to the case where it is impossible to expect a person to avert the evil by anything short of the commission of the offence in question.

27. Professor Kenny states as follows:

> "The defence of necessity, however, can only be important where, as in capital offences, there is a prescribed minimum of punishment. For in all others every English judge would take the extremity of the offender's situation into account, by reducing the sentence to a nominal penalty. Yet where immediate death is the inevitable consequence

> of abstaining from committing a prohibited act, it seems futile for the law to continue the prohibition, if the object of punishment be only to deter. For it must be useless to threaten any punishment, the threat of which cannot have the effect of deterring. Hence, perhaps, it is that in the United States the defence of Necessity seems to be viewed in favor".(31)

Although it may not be so prevalent as in continental countries, the English defence of Necessity is based, in the final analysis, on the same principle as mentioned above in reference to Swiss and Japanese laws.

28. As a further application of this principle, I refer to Article 105 of the Japanese Criminal Code, which provides as follows:

> "In the case where a crime mentioned in this Chapter (i.e. harboring a criminal or suppression of evidence) is committed by a relative of a criminal or a fugitive for the benefit of the criminal or the fugitive, punishment may be remitted".

The harboring or suppression of evidence by a parent or a wife for the benefit of his or her child or her husband is, indeed, an inevitable manifestation of humanity, as expressed by Confucius in his Analects that "the true justice exists where a father conceals for the sake of his child and a child for his father". It would be unreasonable and against human nature to expect him to act otherwise. A similar kind of law is found in England. If a husband who has committed a crime is received and sheltered by his wife, she is not regarded by the law as becoming by such "bare reception" an accessory after the fact or a participator in his treason; for she is bound to receive him.(32)

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(31) Kenny: Op. cit. pp. 77-78
(32) Kenny: Op. cit. pp. 73-74
But a husband enjoys no similar exemption when he assists a felonious wife; he becomes accessory to her felony (Kenny: Op. Cit. p. 89).

29. As another example of the same principle, Article 76 of the old Criminal Code of Japan provided as follows:

> "A person, who has performed his official duty under his superior's order, shall not be punished".

The present Criminal Code has deleted such a provision on the ground that it is included in Article 35, which reads as follows:

> "No act is punishable, which is done in accordance with the provisions of law or regulations or in pursuance of a legitimate business".

It corresponds to Article 32 of the Swiss Criminal Code of 1937 which provides as follows:

> "Any act, which is required by law or by an official or business duty or permitted or declared not punishable by law, is neither felony nor misdemeanour".

30. In the Chinese Tentative Criminal Law, there was no such provision, but in Article 35 of the old Chinese Criminal Code of 1928, it was provided:

> "No act is punishable, which is done in the course of an official duty under the order of one's superior officer".

Then, in Article 21 of the present Chinese Criminal Code of 1935, Articles 34 and 35 of the old Code are combined as follows:

> "No act is punishable, which is done in accordance with law or regulations.
>
> "No act is punishable, which is done in the course of an official duty under the order of one's superior officer, <u>except the case of a person who has known clearly the illegality of such order</u>".

The said Article 21, Paragraph 2, of the Chinese Code implies obviously the following two points: Firstly that no crime will be constituted by any act of a subordinate done under a legal order of his superior, and secondly that a subordinate shall not be held

responsible for any act done under an illegal order of his superior, unless the subordinate knew clearly the illegality of the order.

31. In this connection, the French Criminal Code provides in Article 327 as follows:

> "Murder, wounding or assault committed under the provisions of law and ordered by a lawful authority shall constitute neither felony nor misdemeanour".

And in Article 114, it is provided:

> "A public official, agent or employee of the government shall be deprived of his civil rights in the case where he has ordered or committed any arbitrary act, or any act inimical to the individual liberty or to the civil rights of one or more citizens or to the Constitution.
>
> "If, however, he proves that he has acted under the order of his superiors concerning matters within their jurisdiction, in which matters he is bound to the superiors by a chain of subjugation, he shall be exempted from punishment, etc."

32. In reference to criminal responsibility of a subordinate, Professor Donnedieu de Vabres enumerates three points of view: (a) The theory which maintains the irresponsibility of a subordinate on the ground that he is not allowed to criticize the legality of his superior's orders; (b) the so-called "la theorie des baionettes intelligentes", prevalent in the courts of the United States(33), which have repeatedly refused to recognize any such irresponsibility at all on the ground that a subordinate has the right (and duty ?) to criticize the legality of his superior's orders; and (c) the theory which admits mitigation of punishment in the case where the content of such order was apparently legitimate and its formality was satisfactory.(34)

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(33) Kenny: Op. Cit. p. 73

(34) Donnedieu de Vabres: "Traite elementaire de droit criminel", 1937, pp. 246-247. He seems to agree with the third view.

33. According to Professor Kenny, the official British Manual of Military Law admits it to be still "somewhat doubtful" (Ch. VIII, par. 95) how far a superior officer's specific command, even not obviously improper, will excuse a soldier from acting illegally.(35) Compared to such legislation, the said Chinese Criminal Code (Article 21, Paragraph 2) sweeps away any doubts by stating that punishment will be imposed only upon a subordinate who has acted with a clear knowledge of illegality of his superior's order. It follows, therefore, that in case there existed any ambiguity as to illegality of the order, he shall not be responsible, even if he carried out the order. Since the basic principle of officialdom lies in the chain of command and subjugation, especially in the case of the army and navy, it is according to the thinking of Chinese law, unreasonable to expect him to act contrary to his superior's order, even when he was not quite sure of its being either legal or illegal.

34. On the other hand, Professor Liszt contends that "so long as the absolute binding power of a superior's order is acknowledged by law, such an order will preclude the illegality of his subordinate's act done in accordance therewith", on the ground that "an act done in pursuance of one's duty is never illegal"(36). This contention is erroneous, because since the superior is held responsible for the execution of his illegal order, "the punishment cannot be linked with a legal act"(37). If the superior's order is illegal, we have to admit that the subordinate's act is also illegal. However, the impossibility of expecting him to act other-

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(35) Kenny: Op. Cit. p. 73
(36) V. Liszt: "Lehrbuch des Deutschen Strafrechts", 21-22 aufl., 1919, § 35, s. 146.
(37) M. E. Mayer: "Der allgemeiner Teil des deutschen strafrechte", 1915, s. 334.

wise will exempt him from any wickedness or blameworthiness and hence from any criminal responsibility.

35. According to Professor Sayer, "the conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choosing evil rather than good; there can be no criminality in the sense of moral shortcoming, if there is no freedom of choice or normality of will capable of exercising a free choice".(38) The Nuremberg Judgment ruled that "the true test....is not the existence of the order, but whether moral choice was in fact possible".(39) In my submission, these words are nothing but the enunciation of the principle of impossibility of expectation (Nichtzumutbarkeit).

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(38) Sayer: Op. Cit. p. 1,004
(39) Nuremberg Judgment, p. 16,881

36 The Nuremberg Judgment has brought this principle of criminal law into the field of international law. The relevant provisions of law considered by that Tribunal are articles 7 and 8 of its Charter which in combination correspond to article 6 of the Charter governing this honorable Tribunal. The difference between the said provisions of the two charters is that while in the Nurenberg Charter the official position of defendants, whether as heads of states or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment, and only the fact that they acted pursuant to order of their government or of their superiors may be considered in mitigation, the Tokyo Charter provides that both their official positions and the fact that they acted pursuant to order may be taken into consideration, if the Tribunal determines that justice so requires.

37. Now, the prosecution contends in its summation as follows:

> "The defendants may be divided into three categories: (1) those defendants who had the ultimate duty or . . . responsibility for policy formation fixed by the law of Japan; (2) those defendants, although they do not have the ultimate duty or responsibility, had the duty or responsibility for policy formation in a subordinate or intermediate capacity fixed by the law of Japan; and (3) those defendants who, although they had no duty or responsibility fixed by the law of Japan, have by their acts and statements placed themselves on the policy-making level and are therefore chargeable with responsibility in fact."[40]

40 T.40,542-3.

As to the defendants of the first category, I have already shown in the above that their acts, done in accordance with the law of Japan and in the honest and reasonable belief that such acts would also be justified under international law, preclude any knowledge of illegality and, therefore, their punishment should be remitted.(41)

38. It is further submitted that under such circumstances as existed during the period of 17 years since 1928, no man could have acted otherwise than what the defendants did, should he have been placed in their stead. It was, indeed, humanly impossible for them to stop successive explosions of the long pent-up national sentiments, either at home or abroad. It was also humanly impossible for them to carry out direct control and supervision over numerous subordinates in remote corners of Manchuria, China and elsewhere. In short, can we expect them to exercise their authority and care to such an extent as to turn the tide of national destiny and to prevent the inevitable consequences of sanguine hostilities?

39. As to the defendants of the second category, there was in Japan the so-called Regulations for the Duty of Government Official,(42) which provided as follows:

> "Article 1. Government officials shall, pledging their allegiance and assiduous services to His Majesty the Emperor and the Emperor's Government, obey laws and orders and discharge their respective duties.

(41) See Para. 24, supra.
(42) Ex. 3510, T. 34,003.

"Article 2. Government officials shall, with respect to their duties, observe the orders of their superior officials to whom they are assigned, provided however that they may express their opinions to such orders."

In the case of military men, a more special and vigorous duty was imposed upon them for the observance of their superior's orders. Those who opposed or did not comply with such orders were severely punished as guilty of the crime of defiance under the Army Criminal Code (Arts. 57-59) or the Navy Criminal Code (Art. 55-57).

40. In any case, once a decision or an order was given by his superiors, a civil official or military officer was not allowed to act contrary thereto, whatever his personal opinion might have been. To expect him to act otherwise was, indeed, impossible. Even the Ministers of State and Commanders-in-Chief of various armies and fleets were, in that sense, subordinates to the Emperor. If an Imperial Sanction was issued, they could do nothing but obey it. That is why the Chiefs of Army and Navy General Staffs exercised a great influence not only in military affairs but in political matters by having direct access to the Throne.

41. Even if we assume, for the sake of argument, the existence of some criminal responsibility either under international law or under national law upon somebody in the political or military circles of Japan, it is impossible to attribute such responsibility to any person or body of persons, because in

the 20th century Japan nobody has ever succeeded in obtaining a single post, much less power in the Government, by plots, revolutions and other unlawful means, such as seen in the history of Germany after the First World War. All plots and attempts of revolution were either nipped in the bud or suppressed. By whom? By the very defendants who now stand in the dock. Every one of them was appointed to his post in due course of his career and in pursuance of the laws and customs of Japan. None of them exceeded his authority or was negligent of his duties, prescribed by the regulations of his office. It is true that they belonged to the higher grade in the hierarchic structure of Japan, but it is also shown by evidence that there was no Hitler, no Mein Kampf, no Nazi Party or criminal organization among them.

42. As to the defendants of the third category, whatever popularity and influence they had were derived not from governmental or military sources, but from ordinary citizens at large. They never were powerful enough to be able to force their will upon the politics of Japan. All they could do was to voice the people's sentiments in opposition to the then prevailing bureaucracy. Perhaps they dreamed about the Great East Asia Co-Prosperity Sphere and Asia for Asiatics, but their talks were puerile compared to the nation-wide movement of anti-foreignism in China. If the latter was not treated as an international crime even by the Lytton Report, why should the former be so condemned? If freedom of thought is

to be one of the human rights under national law, why should international law try to stop it?

43. The underlying thought of the prosecution in thus accusing the defendants of the above-mentioned three categories is that a state is a fictitious existence, to which no criminals responsibility can be attributed.(43) The Chief Prosecutor declares that:

> "Nations as such do not break treaties, nor do they engage in open and aggressive warfare. The responsibility always rests upon human agents."(44)

and also that:

> "All governments are operated by human agents, and all crimes are committed by human beings. A man's official position cannot rob him of his identity as an individual nor relieve him from responsibility for his individual offences."(45)

Such a thought follows the maxim:

> "Societas delinquere non potest",

but according to Professor Kearny,

> "it is now settled law that corporations may, in an appropriate court, be indicted by the corporate name, and that fines may be consequently inflicted upon the corporate property."(46)

(43) Prosecutor Jackson: "The Case Against the Nazi War Criminals," 1946, P.82.
(44) Mr. Keenan, Opening Statement, T.473.
(45) Mr. Keenan, T. 434-435.
(46) Kenny: Op. Cit., pp. 65-66.

44. In England, the Interpretation Act, 1889 (52 and 53 Vict. c. 63, S.2) provides that in the construction of every statutory enactment relating to an offence, whether punishable on indictment or on summary conviction, the expression 'person' shall, unless a contrary intention appears, include a body corporate. In the United States, the Criminal Code of New York of 1882 (Article 13) provides that in all cases where a corporation is convicted of an offence for the commission of which a natural person would be punishable with imprisonment, as for a misdemeanor, such a corporation is punishable by a fine of not more than five hundred dollars, as for a felony by a fine of not more than five thousand dollars. The Criminal Code of California of 1901 (Article 26a) provides that corporations are capable of committing crimes in the same manner as natural persons. This legislation is explained by a text book as follows:

> "Under the theory that a corporation is in the language of Chief Justice Marshall 'an artificial being, invisible, and existing only in contemplation of law', it was doubted whether a corporation could be guilty of crime. The modern view tends to regard a corporation as a reality, a group of human beings, authorized by law to act as a legal unit, endowed for some purpose with legal personality."(47)

And further:

> "Where conduct is sanctioned by the directors or officers in whom the corporate powers are vested, their intent should be considered the intent of the corporation. Such persons are more than agents for a natural principal. They embody and exercise the mental element essential for corporate action."(48)

(47) Clark and Marshal: "A Treatise on the Law of Crimes", 4th ed., 1940, pp. 140-143.
(48) Ibid., p. 140.

45. There is no doubt that a State is a juristic person under either national law or international law, while a corporation is such under national law. If a corporation, which is nothing but a body of persons bound by a certain economic or social tie, can be a reality, competent to bear criminal responsibility, why cannot a State be more real and more competent than a corporation? Hackworth states as follows:

> "The terms state and nation are frequently used interchangeably. The term nation, strictly speaking, as evidenced by its etymology (nasei, to be born), indicates relation of birth or origin and implies a common race, usually characterized by community of language and customs. The term state--a more specific term--connotes, in the international sense, a people permanently occupying a fixed territory, bound together by common laws and customs into a body politic, possessing an organized government, and capable of conducting relations with other states."[49]

46. A corporation has no territory nor people, over which it can exercise its sovereignty, nor any natural affinity to bind them together, except a certain specific purpose which may be changed or given up at any time. On the other hand, a State is a foreordained existence and follows a course, which no single man, not even the seventeen cabinets in succession within seventeen years, can change or give up. A shareholder may sell out his shares of a corporation whenever he likes to do so, but the defendants could not back out from their duties imposed by

49. Hackworth Op. Cit., Vol. I, p. 47

their State. Any international obligations are executed or miscarried not only in the name of the State but by the predestined course it takes. If it is defeated in a war, indemnities will be paid or territory be ceded. Are not such measures punishment for its responsibility under international law? Admitting that the sovereignity of a State should be subject to international law, it is respectfully submitted that no responsibility under international law should be attributed directly to any individual because of the following grounds.

47. The Japanese Law No. 125 of 1947, called as the State Redress Law (Article 1), provides as follows:

> "If a public official entrusted with the exercise of the public power of the State or of a public entity has, in the conduct of his official duties, inflicted illegally with intent or through negligence any damage on other person or persons, the State or the public entity concerned shall be under obligation to make compensation therefor.
>
> "If in the case referred to in the preceding paragraph the public official has perpetrated the act intentionally or through gross negligence, the State or the public entity concerned shall have the right to obtain reimbursement from the said public official."

The above provisions of the Japanese law are introduced for the purpose of democratization of the Japanese legal and political systems, but they do not recognize any direct claim against an official by an afflicted party for any damage inflicted illegally in the course of the official's duties.

the provisions of the regulations respecting the Laws and Customs of War on Land shall, if the case demands, be liable to pay compensation and that it shall be responsible for all acts committed by persons forming part of its armed forces. According to the judgment of In re Piracy Jure Gentiums, 1934, it is expounded as follows:

> "With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the Municipal law of each country."[52]

51. It is respectfully submitted, therefore, that even if the defendant had been guilty of a criminal intent or of gross negligence in carrying out their official duties, all the accepted authorities upon international law would not recognize any direct responsibility upon them vis-a-vis foreign States or foreigners. How can international law impose any responsibility upon those who have done their duties in accordance with the laws of their land and in the honest and reasonable belief that their acts were also in conformity with the prevailing rules of international law? In this connection, I should like to refer to the Statute of the Permanent Court of International Justice (Article 38), which provides:

> "The Court shall apply:
>
> "1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

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52. A. C. 586, 589; cited in Hackworth, Op. Cit. Vol. I, p. 38

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Defense Summation on Personal Responsibility

Errata Sheet (No. 2)

Page	Line	
3	17-18	Insert between the two lines: "its paragraph 2 that: "No person shall be punished in," The sentence should read: "Since Article 77 of the old code provided in its paragraph 2 that: "No person shall be punished in the case where he committed a crime without knowing the facts which constitute the crime," ---
13	9	"Natrual Law" should be "Natural Law."
16	First line of Note (27)	"McNangton's Case" should be "McNaughten's Case."
17	4	At the end of the line, insert "17".
"	8	At the end of the line, insert "was".
23	13	"Expection" should be "expectation".
28	6	"criminals" should be "criminal".
34	6	"Gentiums" should be "Gentium".
35	28	"legislators" should be "legislations"
"	Before the first line of Note (54)	Insert: "(53) Mr. Keenan, T. 459."

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Defense Summation
on
Personal Responsibility

Errata Sheet

Page	Line	
1	12	"Fenerback" should be "Feuerbach".
12	19	"be" should be "lie".
"	20	"be" should be "lie".
"	20-21	"contraband or war" should be "contraband of war".
"	22	"vitiated" should be "visited".
15	12	"Professor" should be "Professor Hafter"
"	21	"McNaughton's" should be "McNaughten's".
22	4	"ebiously" should be "obviously".
	Last line of Note (37)	"strafrechte" should be "strafrechts"
29	Last line of the text	Insert: "In other words, whenever a director's act is deemed to have been done for the interest of his corporation, his intention being also to act on its behalf, such act will be absorbed by the corporation and become its act, losing the identity of any individual's act".
30	13	"nasei" should be "nasci".

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Defense Summation on Personal Responsibility

Errata Sheet (No. 3)

Page	Line	
8	Note (11)	Insert "p. 123" after "p. 122".
12	Note (17)	"p. 68" should be "p. 69".
19	Note (31)	"pp. 77-78" should be "pp. 78-79".
28	22	"Professor Kearny" should be "Professor Kenny".

The first line of the first Errata Sheet should read:

Page	Line	
9	12	"Feuerbach" should be "Feuerbach".

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個人責任論

草野豹一郎
岡本敬男

裁判長並に裁判官各位

(一) 本辯論の目的は近代刑法の見地より全被告に對し訴追されてゐる刑事責任の問題を檢討するにあります。

首席檢察官は其の冒頭陳述に於て次の如く述べられました。曰く、「文明國に於ける殺人罪の普通の定義は、法律上の正當性なくして故意に人を殺すと云ふことであるから、我々は何が法律上の正當性を構成するかを考へねばならぬ。此の正當性は、身体若くは財産を防衛する場合又は、恐らくは、適法に構成せられた裁判所の命令を單に執行した行刑官の場合に通常限られてゐる」と。法律上の正當性の問題は元より重要でありますが、夫れは今時に「意思」の問題を考慮に入れてのみ理解出來るものでありま す。遺憾なことに、首席檢察官は後者を全く論議の外に置かれ、恰も被告

等の犯意は當然の如くにされて居ります。

（二）記錄四二五頁

（二）然下ら、或る行爲にして一定の客觀的犯罪構成要件に該當し、而かも首席檢察官の云はれる如き法律上正當性の存しないものに付て、其の行爲者に刑事責任を認むるには、(イ)行爲者が責任能力を有してゐたこと、(ロ)其の行爲が故意（原則）又は過失（例外）に出たものであること、(ハ)行爲者に對し行爲の當時斯かる行爲を爲さぬことを期待し得る可能性が存したことの三要素を更に必要とするのであります。此の三点に付て、以下逐次に檢討して見たいと存じます。

（三）本件被告に關しては、大川の場合を除き、彼等の責任能力を顧る必要はありますまい。各被告が行爲當時より「自己ノ行爲ノ不法ナルコトヲ辨識スル能力又ハ其ノ行爲ノ不法ナルコトヲ辨識シテ行爲スル能力」（三）を有

して居たことは疑ありません。

(三) 瑞西刑法第十條

(四) 故意と過失の点に付き、セイヤー教授が其の犯意論に於て、「メンスレアに正確な意義を附せんとせんか、判例學説の一致を見ざること、失望に堪へたり」(三)とまで慨嘆して居られることに鑑み、私は先づ、刑法上の最新原則を採用した國々の立法を若干簡單に一瞥し、私の論據とするところを決定して置きたいと存じます。

(三) セイヤー「メンスレア」、ハーグード法律評論、第四十五巻(一九三一―三二年)九七四頁

(五) 現行日本刑法第三八條は第一項に於て「罪ヲ犯ス意ナキ行爲ハ之ヲ罰セズ、但法律ニ特別ノ規定アル場合ハ此限ニ在ラズ」とし、第三項に於て「法律ヲ知ラザルヲ以テ罪ヲ犯ス意ナシト爲スコトヲ得ズ。但情狀ニ因リ其

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刑ヲ減軽スルコトヲ得」と規定して居ります。右第一項は「犯罪ヲ構成スル爲ニハ意思ト行爲ガ伴ハネバナラヌ」との格言を法文化したものであり、第三項は「法律ノ不知ハ宥恕セズ」とする諺を表現したものであります。更に、右第一項（四）と殆ど全様の辞句を受継いだものであり、又、現行法の第三項は旧法第七七條第四項（五）を修正採用したものであります。而して旧法第七七條第二項が「罪トナルベキ事實ヲ知ラズシテ犯シタル者ハ其罪ヲ論ゼズ」と規定してゐたところから、判例の多くは「罪ヲ犯ス意」を罪となるべき事實を知ることに外ならないと解したのであります。

（四）「罪ヲ犯ス意ナキノ所爲ハ其罪ヲ論ゼズ、但法律規則ニ於テ別ニアラズ」

（五）「法律ヲ知ラザルヲ以テ犯ス意ナシト爲スコトヲ得ズ」

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(六) 此の解釈に依れば、犯意の成立するには、罪となるべき事實、即ち行爲及それから生ずる自然的結果の認識を必要とするも、其の認識が証明される以上、行爲の違法性を意識したかどうかを探究する必要はないとせられるのであります。而して此の解釈の歸結として、事實の錯誤は法律の錯誤より峻別され、前者に於ては犯意を全く阻却するも、後者の中、刑罰法規の錯誤は犯意を阻却せず、非刑罰法規の錯誤のみが結局は事實の錯誤に外ならぬとの推定により、犯意を阻却すると云ふのであります。此の解釈の適例として左の如き日本大審院の判例があります。即ち「弁済ニ因リ差押ノ效力ヲ失ヒタリト誤信シ、差押物件ノ封印、差押標示ヲ損壞シタルトキハ、本罪(刑法第九六條)ノ犯意ヲ阻却ス」と云ふのであります(六)。

(六) 大正十五年二月二日大審院第二刑事部決定(判例集、刑、第五巻九七頁)

(七) 右の場合に於て、行爲が民事法規の誤解に出でたものであることは間違ひありませぬ。然ら果して罪となるべき事實の認識がなかつたと左樣簡單に云へませうか。右の場合に犯意が阻却せられる所以は、民事法規の誤解から引いて罪となるべき事實の認識を欠くに至つたことにあるのではなく、寧ろ、罪となるべき事實の認識は充分であつたが、民事法規の誤解から其の行爲の許されざること ― 違法性 ― の認識を欠いたことにあると解するのが妥當ではありますまいか。

(八) チューリヒ大學のハフテル教授は瑞西に於ける犯意に關する學說判例を論じた末、「違法性は犯罪概念の要素である。それが個々の法律構成要件にうたはれて居ると否とは問ふところでない。此の原則に附加するに、犯意は犯罪の構成要件に屬する一切の要素に關聯を持たねばならぬとする今一つの原則を以てするならば、行爲者に於て自己の擧動の違法性に付ても

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意識したのでなければならぬと云ふ結論を拒否する訳には行かぬ。このことを否定せんと試みることは、法律の錯誤軽視の恐るべき勢力に屈服することである。簡單な説明は洵に必要である。違法性の意識は行爲者が一定の法律規則に違反することを知るの意味ではない。……刑罰法規の個々規範に付て行爲者が何等知ってをる必要はない。併し行爲者の素人考、即ち法律感覚として彼が許されざる行爲をなすものであることを告ぐるを要はあるのである。……此の違法性の意識が存する場合に於てのみ、裁判官は犯罪を故意に行ひたるの故を以て有罪の判決を下すことが出來る。このことを『責任なければ刑罰なし』の公理が要求する。犯罪の實行に際して極めて稀に起きることではあるが、行爲者が自己の行爲の義務違反であること、許されざることの意識を有せざりし上、彼の全人格からして右意識を有し得ざりしことが現實に立証し得られた場合に於ては、彼に有罪

判決を下すことは最低の刑を以てしても一個の恥辱である」（七）と説いてあります。

（七）ハッテル、瑞西刑法教科書、總論、一九二六年、一一七頁

（九）更にハッテル教授は、「事實の錯誤と法律の錯誤、進んでは非刑罰法規の錯誤と刑罰法規の錯誤とを区別せんとする一切の試は維持すべからざるものである。嚴格な一線を劃することはむづかしい。責任論の立場からすれば、行為者に於て自己の行為の犯罪的特質に付て錯誤したことは顧慮せられねばならぬ。誘拐犯人が被誘拐少女の年齢を知らざりし場合、行為者が謀殺犯人を隱匿すると云ふことを知らざりし場合、教師が自己の有する懲戒權を錯誤したる場合、……此等すべての各種錯誤の場合に於て行為者の善意なることが異論なく立証せられたる場合に於ては、裁判官は断じて故意を認めてはならぬ。之に反して、行為者に於て自己の行為の可罰性、

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法律上の性質――竊盗罪なりや又は横領罪なりや――に付て、刑罰制裁の程度や處罰條件に付て、訴訟條件の存在等に付て錯誤したることは、之を顧慮する要はない」（八）と主張されてゐます。

（八）ハフテル、前掲　一八四頁

（十）右に掲げられた誘拐の設例は英國に於ける一八七五年のプリンス被告事件により具体化されます。プリンスといふ男が十六才未満の少女を十八才だと信じて其の父親の下より誘拐したのです。眞實十八才であれば誘拐は罪になりません。又、彼が斯く信ずるには相當の理由がありました。然るに、判事の大多数は、「法律上悪イトコロノ何事カヲ爲ス意思」即ち犯罪に非ざる私法上の不法行爲でさへもなす意思あらば犯意を構成するとの見解に賛成し、更に若干の判事達は、刑事上民事上共に合法的とするも「道徳上悪イトコロノ何事カヲ爲ス意思」あらば犯意充分なりとの見解を立てたの

であります（九）。セイヤー教授は此の事件を評して、犯意の問題に関する近來のどの事件よりも一層法律を不安混乱に陥らしめたものと云つてゐますが（十）英國判事達の右の意見を以て、違法性の認識が犯意の本質的要素なることを彼等が承認したものであると解することは出來ないでせうか。

（九）ケニー、刑法概論、第十四版、一九三三年、四一―四二頁

（十）セイヤー　前掲、一〇二五頁

（十一）扨、此の考へ方は過失の問題を研究するとき、更に明となります。ケニー教授に依れば、「親の方に幾分の過失があつたと云ふ事實だけでは充分でない。子供が死なうが死ぬまいがかまはぬとする親の態度を陪審員が認める程、重大な過失、即ち邪悪な過失がなければならぬ」（十二）とし、又、

「自動車運轉者が民事々件で過失を訴追される場合、大低敗訴するものであるが、過失殺人の刑事訴追を受けたときは然らざることが多い。即ち處

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罰せられる價値がある程、他人の生命安全を無視したと云ふ邪悪な過失がなければならぬからである」（十一）と説かれてゐます。されば過失が刑法上罪となるには、單なる不注意に止まらず、邪悪であり、非難さるべきものでなければなりません。此の意味に於て、故意と過失との区別は行爲の違法性に対する認識の程度に過ぎないと云へませう。

（十）ケニー　前掲　一一二頁

（十一）前記英法學者達の見解は現代刑法の一原則の積極面、即ち犯意は違法性の認識により決定せられるとするものであり、ハフテル教授の意見は全一原則の消極面、即ち違法性の認識を欠く場合には犯意を阻却するとなすものであります。此等の考へ方を以て、再び「法律ノ不知ハ宥恕セズ」（十二）との格言を讀むならば、それは、(イ)行爲者が行爲の違法性を意識して居た限り、法規を知らざりし場合でも處罰し得ること、(ロ)行爲の違法性の意識

を欠いた場合でも、其の意識を欠いたことに過失があり、之が非難さるべき時には處罰し得ること、而して(ハ)罪となるべき事實の認識を假令持ってゐたとしても、違法性の意識を欠き、其の欠いたことに過失がなかった場合又は過失ありとするも之を非難するに足らざる場合には處罰せられぬことを意味するであります。

(十二) 日本刑法第三八條第三項

(十三) レーディン教授は次の様に述べて居ります。即ち、「英法に於ける犯意は刑法の不知が宥恕であることを意味するものと考へられてゐなかった。ドイツ普通法に於ては、第十九世紀の末葉まで、矢張、原則は『法律ノ不知ハ宥恕セズ』となふことにあった。處がフオイエルバッハの影響で宥恕ス五六十年の久しきに亘り許容せられることとなった結果、近代のドイツの法律に古い規則が復活せしむるとなふ尖鋭的な反動を起さしめることと

なった。フランスに於ては極めて稀有な事情の下に認められたに過ぎない。然しソールウェー法典は錯誤の存するところには刑が軽減せられ得るに止らず、全然免除せられ得ることをも規定してゐる。事實、大陸の學者の多くは一般に普及して居る首からの原則を廃棄するか又は少くとも制限することに賛意を表してゐる。而して若干の最近の刑法草案は刑の軽減を規定して居る」(十三)と云はれました。

(十三) レイデイン、犯意論、セーリックマン社會科學百科辞典、第八巻、一二九頁

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(而) レイデイン教授が斯く云はれるに付ては、一九一八年の瑞西刑法草案を考へてみられたな違いありません。然乍ら其の後の立法例は殆ど例外なく違法性の錯誤を以て刑の減軽に止らず、刑の免除を招來するものと規定して居ります。如何にも瑞西草案第十八條は違法性の錯誤に付いて單に刑

の減軽のみを認めたに過ぎなかったのでしたが（西）一九三七年に公布せられた現行刑法は第二十條に於て「行爲者が十分ナル理由ノ下ニ行爲ヲ爲ス權利アリト信ジタルトキハ、裁判官ハ自由裁量ニ依リテ其ノ刑ヲ減輕シ又ハ免除スルコトヲ得」と規定したのであります（十五）。

（西）「行爲ヲ爲スノ權利アリト信ジテ犯罪ヲ行ヒタル者ハ其ノ刑ヲ減輕スルコトヲ得」

（去）瑞西刑法第二十條は一九二七年の合國單刑法第十七條の規定を文字通り踏襲したものである

（去）一九二八年以前に行はれてゐた中國暫行新刑律まで遡つて見ますと、其の第十三條第二項は「法令ヲ知ザルハ故意に非ズト爲スコトヲ得ズ。但シ其ノ情節ニ因リテ一等或ハ二等ヲ減ズルコトヲ得」と規定してゐました。が、一九二八年の旧刑法第二八條で右を修正し、「法令ヲ知ラザルニ因リ

テ刑事責任ヲ免除スルコトヲ得ズ。但シ其ノ情節ニ因リテ本刑ノ二分ノ一ヲ減軽スルコトヲ得」となし、更に一九三五年より實施された現行中國刑法は其の第十六條に於て、「法律ヲ知ラザルニ因リテ刑事責任ヲ免除スルコトヲ得ズ。但シ其ノ情節ヲ按ジテ其ノ刑ヲ減軽スルコトヲ得。若シ法律ノ許可スル所ナリト自ラ信ジ且ツ正當ノ理由アルモノハ其ノ刑ヲ免除スルコトヲ得」と改しました。中國法に於ける斯くの如き改變は法令の不知に對する形式的解釈より違法性の不意識に對する本質的理解への漸進的移行を明瞭に指し示すものであります。

(六) 以上に於て私が此の初歩的とも見られる刑法原則を叙述した所以は、英國に於ては法律の錯誤が假令不可避の場合でも罪の宥恕とならぬとケニー教授が云はれて居るからであります。即ち法律の錯誤の有し得る最大の效果は、酌量の場合と全じく、特種の犯罪に於て必要な特別形態の犯意

の存在を、時に否定するに止まる。竊盗は、物を取り上げる権利の見せ掛けさへもなくして之を取る時に行はれるのであるから、善意にして相當理由ある錯誤は、それが法律上のものにせよ、例へば村の慣習で麥を刈り取ることになつてゐた所で刈入をした農婦の如く、充分な辯護の根據となる。抵當權設定者が、抵當に入れた自分の家の造作を、誤つた然し善意の權利行使として破壞した場合には、彼は『惡意』の毀損罪を犯すことにならぬ。然るに、斯様な例外的犯罪を除いて、法律の錯誤を無視する法則は嚴重に貫徹されてゐる」と述べて居ります（十六）

（十六）ケニー、前掲　六九七ページ

（十七）然し他方に於てケニー教授は、「此の法則を單なる公共團体の細則にまで及ぼさうと云ふ判例は聞いたことがない。英國でも米國でも（ポーター對ウアリング事件、紐育、六九巻二五〇頁）判事は右細則を認める前に其

の立証を求めるであらう。さもなければ、法律の立前として、判事以上の法律知識を一般人に望むのはどうであらうか」と説いてゐます（十七）當裁判所が國際法上の普通法又は一般法若くは自然法と時により學者によつて稱せられる大きな法的存在のあることを顯著なる事實として認められると致しましても（十八）それは公共團体の細則よりも更に不明瞭不確定な法律であり、而して國際法違反の行爲は若干の場合を除き、國内法に於て刑事責任を惹起する程、非難さるべきものとは考へられてゐないと云ふことを主張したいと存じます。ケニー教授に依れば「國際法は英國法の一部であると時に云はれてゐるけれども、それは基督教に付いて各様の言がなされる如く漠然とした歴史的意味に於てのみ眞實であることを注意せねばならない。」次自身を愛するが如く次の隣人を愛せざりしとて起訴せられることはないと各様に、戰時禁制品を貿易したり、封鎖を潜つたりしても訴追せられるこ

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とはない。此等の行爲は國際法に於て沒收の刑が課せられてゐるけれども、英國法に於ける犯罪を構成せざるのみならず、之に關連する契約を無效ならしめる程には不法と見られてゐないのである」と（十九）

（十七）ケニー　前揭　六八頁註四

（十八）キーナン氏、冒頭陳述、記錄四〇五―六頁

（十九）ケニー　前揭　三三四―三三五頁

（六）右の主張に對しては、國際法は獨自の法であり、國內法と全く異る見地より如何なる行爲をも任意に處罰することが出來るといふ反對論があるのでありませう。然乍ら、首席檢察官の引用せられるライト卿の言に依れば「余の前論文に於て國際法は如何に不完全なりと雖も、全文明國の共通的傳統たる善惡の觀念又は正義人道の本能より生れ出たものであることを認むる樣に論述した。それは長い間『自然法』と呼ばれてゐたが、今日に於て

は、凡ゆる紳士の有すべき善悪の本能的觀念より流れ出るもの又は凡ゆる文明國に共通なる原則より由來するものと云つた方が簡單であり眞實に近いであらう。之は總ての法律の最終的基礎であり、又そうでなければならぬ」とあります（二十）換言すれば、「國際法の根源は國内的立法者の行爲以外に求めねばならぬ」（二十一）としても、それは總ての法律に共通なる善悪の本能的觀念に根據を有さねばならぬのであります。それは強者の法、征服者の法であつてはならぬのであります。

（二十）記錄四五一八頁

（九）從來採用せられてゐた「國際法」の定義は獨立國家間の關係を支配するものであつて、（二十一）個人に關するものではありませんでした。即ち常識上の問題として、「國際公法は獨立國家相互間の關係に於ける其等の國家の行爲を律するものである。それは狹義の法、即ち執行力をもつ法とは本

質的に異る。蓋し執行力は訴訟當事者に優越する力を意味するのであるが、獨立國家は各國に共通な優越者を認めてゐないからである。從て彼等の行爲を律する法規は戰爭犯以外に執行すべき手段を有しない」（三十三）と理解されてゐました。首席檢察官でさへ、「此等高位の文官達の個人的責任といふことは、本法廷に提出される國際法上の最も重大な問題の一つであり、且つ恐らく其の唯一の新しい問題であらう」と認めて居られます。

（三十一）ロータス號（佛國對土耳古）國際司法常設裁判所判決、一九二七年九月七日、ハックワース、國際法輯覽、一九四〇年第一卷二頁に引用

（三十二）バーンズ法律辭典、一九三三年、四八七頁

（三十三）記錄四三五頁

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(ヰ)、首席檢察官に依れば、檢察側は「本公訴狀に指名された被告等の何れもが不法なる此等の所業に重大なる役割を演じ、日本の條約義務及び彼等の行爲が犯罪である事実を熟知の上行動したことを立證するであらう」(二十四)と云ふのですが、茲に檢察側論據の誤りがあると思はれます。何となれば、條約義務の認識と行爲の違法性の認識とは全く別個の問題であるからであります。近代の國内法に於ては、契約違反は故意によると然らざるとに拘らず、之を處罰して居りません。國際法に於ても條約違反に付き個人を刑事的に處罰したことは、先づ所謂普通戰爭犯罪と海賊の場合を除き未だ曾てないのであります。それでさへ「海牙條約は其の何處にも斯くの如き行爲を犯罪なりとして指摘せることなく、又犯罪者を裁判し處罰する爲め課刑の定めもなければ法廷の問題に關する言及もないのである」(二十五)と檢察側が認められてゐる通りであります。

（二十五）記錄四二二頁

（二十五）記錄三九〇の七頁

(三) 檢察側又は辯護側より提出された證據に依れば、全被告は其の各別の地位に於て處理すべき條約義務に付き全力を盡して之を実行せんと努めたことが明白に立證せられました。それは彼等が全力を盡さざる場合に刑事責任を生ずることを認識したからではなく、條約それ自体の神聖を維持せんことを欲したからであります。檢察側の主張する條約義務違反の何れもは、不可避不測の狀況より生じたことが立證されました。當法廷に起訴された被告行爲の總ては、彼等の國法に從って爲されたものであります。若し「行爲者の素人考、即ち法律感覺として彼が許されざる行爲をなすものであることを告ぐる必要」ありとするハフテル教授の言が正しければ（二十六）被告等の行爲は國內法により許されたるのなりと彼等の法律感覺が告

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げる時、それと全時に如何にして其の法律感覺が右行爲は國際法に於て許されざるものなりと告げることが出來ませうか。

（二十六）上述(九)參照

(二十二)マクノーテン事件に於ける判事達は次の様な意見を述べました。

「被告が或る架空の苦情又は損害を救濟若くは報復するとか或は公共の利益を齎すとか云ふ狂的妄想の爲め行爲した場合、若し犯行當時彼が法に違反することを知つてゐたならば、目的の如何に拘らず處罰せられる。茲で法と云ふのは國內法のことを意味するのであるし（二十七）、若し國內法と國際法とに食ひ違ひがあれば、此の判事達は前者の優越を主張するに躊躇しないでありませう。被告等も然りと存じます。然し乍ら私が強調したいことは、被告等が彼等の行爲につき、國內法による正當性を有してゐたのみならず、國際法に於てもそが正當視されるものと善意且正當に信じて

あと云ふ事実であります。

（二十七）マクノーテン事件、一八四三年、ウイルシャー、刑法判例集、第三版、一九三五年、三一頁

（二十三）検察側は共同謀議に関する其の論告に於て、「若し彼が當時奉職中であり良心の咎めを押へ付けることを許してまで職に留ってゐたならば、彼は明かに有罪と せらるべく、且つ道義上より見るも斯かる良心の咎めなき者同様罪悪を犯してゐると云はねばならぬ」（三十八）とし、又、個人責任殊に閣僚に関する論告に於て、「彼は侵略手段に賛成投票するか又は黙従を示す代りに何時でも辞職することが出来たのである。若し彼の個人的信念にも拘らず、彼又は其の内閣が継続在職する方を重要なりとして辞職しなかつたならば、侵略政策に全力を傾けて居つた主謀者達と同等の法律的責任を有すべく、罪悪を充分認識し確信しながら右政策を故意に選んで

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是認したと云ふ意味に於て、彼等以上の道徳的責任を有することになる」（三十九）と論断されてゐます。

（三十八）記録三九、〇五七頁

（三十九）記録四〇、五五四―五頁

(五)斯様な非難は被告に関する限りに於て、全く的を外れたものと云はねばなりません。公訴状の期間、即ち一九二八年一月より一九四五年九月に至る迄に於て、十七の内閣が出来たり崩れたりしました。一内閣の平均寿命は唯の一年であります。斯かる状況の下にあつては、侵略にせよ防禦にせよ一貫せる國策を期待し得るでありませうか。されば、被告等の難点は彼等が其の信念に拘らず高位にしがみついてゐたと云ふことではなく、寧ろ其の政策を実行するには政治的責任感が強過ぎて余りにたやすく職を棄てたところに存するのであります。彼等が辞職する時に於て、若し辞職し、

なかったなら、國際法上の刑事責任をも負ふことになるぞと彼等の法律感覺が告げたのでありませうか。或は告げねばならなかったのでありませうか。正氣であるかぎり、國際法の大學者と雖も斯かる荒唐無稽なことを夢見るものはないでせう。然し檢察側の論理より生ずる唯一の結論はそうなるのであります。何れにせよ、當法廷に提出された證據は、被告等が其の行爲の國内法及び國際法上の正當性を信じたこと、又、斯く信ずるに妥當な理由を有してゐたことを證明しました。たとへ彼等が或る事後法により國際法上刑事責任ありと判定されねばならぬとしても、前記中國刑法第十六條にへ三十〉表現せられる原則が採用されるならば、彼等の刑は免除せらるべきものであります。

〈三十〉 上記第十五項參照

(三十五) 國際法の問題は今暫く之を置き、刑事責任を生ぜんがためには、行爲

者に對し行爲の時に於て期かる行爲を爲さぬことを期待し得る可能性の存在を要するとする原則に付て簡單な説明を試みたいと存じます。一九三七年の瑞西刑法第三四條は此の原則を最も良く表現して居ります。即ち、「何人ト雖モ自己ノ權利、特ニ生命、身体、自由、名譽、財産ヲ急迫ニシテ他ニ避クル方法ナキ危難ヨリ救ヲ爲メ爲シタル行爲ハ其ノ危難ガ行爲者ノ責ニ帰スベキモノニ非ズ且其ノ際ノ事情ニ照シテ其ノ者ニ脅威セラレタル權利ヲ拋棄センコトヲ期待シ得ザリシモノナルトキハ之ヲ罰セズ」との規定であります。

(三六) 日本刑法第三七條は「自己又ハ他人ノ生命、身体、自由若クハ財産ニ對スル現在ノ危難ヲ避クル爲メ已ムコトヲ得サルニ出デタル行爲ハ其行爲ヨリ生ジタル害其避ケントシタル害ノ程度ヲ超エザル場合ニ限リ之ヲ罰セズ。但其程度ヲ超エタル行爲ハ情狀ニ因リ其刑ヲ減輕又ハ免除スルコトヲ

得」と定めて居りますが、此の規定の土台となる思想も前記瑞西刑法と全じく、問擬されてゐる罪を犯さずして危難を避けることを期待することが不可能な場合には刑事責任を問はないと云ふにあります。

(三七) ケニー教授曰く、「然らば緊急避難の辯護は、死刑の課せられてゐる犯罪の如く、刑の最低限の定めある場合にのみ重要である。其の他の場合に於て英國の判事は何れも犯人の已むを得ざりし立場を斟酌し名義的な刑を言渡すに違ひないからである。」とは云へ、禁ぜられた行爲をやらぬ結果として必然的に死が差し迫ると云ふ様な場合、若し科刑の目的が犯罪予防の爲めのみに存するならば、行爲の禁止を法律が繼續しようとしても無駄であらう。蓋し如何なる刑を以て威嚇しても、その威嚇が予防の效果を擧げ得ないものは役に立たないからである。多分此の理由により、米國では緊急避難の辯護に贊意を表するものが多い様である」と(三十二)。英國に於け

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る緊急避難の辨護は大陸諸國の如く流布されてゐないかも知れぬとしても究局に於ては、瑞西法、日本法に付て前述した原則と全一の根據に立つものであります。

（三一）ケニー、前掲、七七―七八頁

（三二）更に、此の原則適用の例として、日本刑法第一〇五條を引用致します。全條に於て、「本章ノ罪（即ち犯人藏匿又は證憑湮滅）ハ犯人又ハ逃走者ノ親族ニシテ犯人又ハ逃走者ノ利益ノ爲メニ犯シタルトキハ其ノ刑ヲ免除スルコトヲ得」とありますが、親なり妻なりが其の子又は其の夫の爲めに爲す藏匿行爲若くは證據湮滅行爲は人情已むに已まれずして爲すところであつて、孔子も論語に於て「父ハ子ノ爲ニ隱シ子ハ父ノ爲ニ隱ス。直キコト其ノ中ニ在リ」と云つてゐる位であります。斯かる行爲に出でざることを彼に期待するは、全く人情に反する無理な注文であるからであります。

之と全様な法律は英國にも存在してゐます。即ち、若し罪を犯した夫が妻により藏匿されたとしても、「單なる庇護」のみでは、妻は事後幇助者或は重罪共犯者とならないとされてゐます。蓋し妻は夫を迎へ入れねばならぬからであります（三十二）。ケニー、前掲、七三一七四頁。

然乍ら、重罪犯人たる妻を庇護する夫は斯様な免除を受けず、從犯となる（ケニー、前掲、八九頁）。

（元）同一原則の今一つの例として、日本旧刑法第七六條は「本属長官ノ命令ニ從ヒ其職務ヲ以テ爲シタル者ハ其罪ヲ論ゼズ」と定めてゐましたが、現行法はこれが第三五條の「法令又ハ正當ノ業務ニ因リ爲シタル行爲ハ之ヲ罰セズ」とする規定に包含せられると解して之を削除しました。右規定は一九三七年の瑞西刑法第三二條が「法律又ハ公務上若クハ業務上ノ義務ガ命

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ズル行爲又ハ法律ガ許サレタルモノ若クハ處罰セザルモノト明言セル行爲ハ重罪又ハ輕罪ニ非ズ」と云ふ所に該當するものであります。

(三) 中國の舊行新刑律に於ては此の種の規定がなかつたのでありますが、一九二八年の舊刑法第三五條では「所屬上級公務員ノ命令ニ依ルノ職務上ノ行爲ハ罰セズ」と規定せられ、次で一九三五年の現行刑法第二十一條に於て旧法第三四條及び第三五條を併せて次の如き規定が設けられました。

即ち、

「法令ニ依ルノ行爲ハ罰セズ。所屬上級公務員ノ命令ニ依ルノ職務上ノ行爲ハ罰セズ。但シ明カニ命令ノ違法ヲ知ル者ハ此ノ限リニ在ラズ」

と云ふのであります。此の中國刑法第二一條第二項が次の二点を意味することは明白であります。即ち、其の一は適法なる上官の命令に依る下

官の行爲は何等の犯罪を構成しないと云ふことであります。其の二は違法なる上官の命令に依る下官の行爲は、下官が命令の違法性を明かに認識せぬ限り、之を處罰すべからずと云ふことであります。

(三) 此の点に関し、佛國刑法は第三二七條に於て「正當ナル官憲ニ依リ指令セラレタル殺人、傷害及ビ毆打ハ重罪ヲモ輕罪ヲモ構成スルコトナシ」とし、第一一四條に於て

「官吏、政府ノ職員若ハ傭員ニシテ專横ナル行爲又ハ個人ノ自由若クハ市民ノ公權或ハ憲法ヲ侵害スベキ行爲ヲ命ジ又ハ爲シタルトキハ公權剥奪ノ刑ニ處セラルベシ。

但シ服從ノ義務アル上官ノ管轄事項ニ付キ其ノ命令ニ從ヒテ爲シタルコトガ證明セラレタルトキハ其ノ刑ヲ免除ス云々」

と規定して居ります。

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(三十三、下官の刑事責任に関し、ドンヌデイウド、グーブル教授は凡そ三說あることを挙げて居られます。第一說は下官に上官の命令の適否を批判することを許さずとする立場から下官の無責任を主張するものであり、第二說は上官の命令の適否を批判する権利(或は義務?)ありとの理由で下官の無責任を屢々繰返し否定して来た米國判例(三十三)の如き所謂「知慧の劍」說であり、第三說は其の命令が適法な内容を有するものと見られ且つ形式上の要件を備へて居たときは刑の軽減を認むべしとするものであります(三十四)

(三十三) ケニー、前掲、七三頁

(三十四) ドンヌデイウド、ドヴーブル、刑法綱要、一九三七年、二四六—二四七頁。彼は第三說に左袒されてゐる様である。

(三十三) ケニー教授に依れば、英國軍事法規提要は、上官の特定命令が明かに

不當なものでない時に於て之に從った兵卒の違法行爲を如何なる程度まで看過するか、まだ「多少の疑義」ありとしてゐる（第八章第九五條）そうであります。（三十五）　斯様な立法に比較して、前記中國刑法（第二一條第二項）は上官の命令の違法性を明かに認識して行爲せる下官のみを處罰すると定め、總ての疑義を一掃したのであります。されば、若し命令の違法性につき何等かの疑問があれば、之を実行したとしても責任はないと云ふことになります。蓋し命令服從を本義とする吏道、殊に陸海軍の場合に於て、上官の命令が適法なりや違法なりや下官としてはつきりせぬときと雖も、其の命令に反する行爲を下官に期待することは、中國法の考へ方に從へば、無理だからであります。

（三十五）　ケニー、前掲、七三頁

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(三五) 牧野に於ては、リスト教授に依れば、「部下に對する上官の命令は、法規が命令の絶對的拘束力を承認するものなる限り、部下に對し、命令に基いて爲された行爲の違法性を阻却するものである」とされ、其の理由として「義務に適合する行爲は斷じて違法たり得ない」と云はれてゐますが、(三十六)、違法命令を發した上官が其の命令の實行につき責任を負ふものである以上、「刑罰が適法な行爲に結びつけられることはあり得ない」(三十七)、故に、其の論は謬つてゐると云はねばなりませぬ。上官の命令が違法であらば、下官の行爲も亦違法であることを認めねばなりませぬ。但し下官に斯かる行爲を爲さざることを期待することが不可能である爲め、下官には邪惡性も非難可能性もなく、其の刑事責任を免除するものと解するのであります。

(三十六) リスト、獨逸刑法教科書、第二一—二二版、一九一九年

第三五節一四六頁。

（三七）、マイヤー、独逸刑法總則、一九一五年、三三四頁、

（三八）セイヤー教授に依れば「非難に値すること、道徳上罪あることと云ふ観念は必要的に善より悪を有意的に選ぶところの自由意思に根底づけられて居る。若し選択の自由即ち自由な選択を行ふことを得る意思の常規性がないならば、道徳的欠陥を意味する犯罪性は存在し得ない」（三八）とされ、

ニュルンベルヒの判決も亦、「刑ノ減軽事由ノ真ノ判断標準ハ命令ノ存在ニ非ズシテ事実ニ於テ道徳上ノ選択が可能ナリシヤ否ヤニ存ス」（三九）と断ぜられて居りますが、私の考へでは、此等の言は何れも期待可能性の原則の表明に外ならぬのであります。

（三八）セイヤー、前掲、一、〇〇四頁

（三九）ニュルンベルヒ判決書、一六八八一頁

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(三五) ニュルンベルヒの判決は刑法上の此の原則を國際法の分野にまで斎したのであります。彼の裁判に於て考慮された関係法規は其の條例第七條及び第八條で、それ等は併合して當裁判所條例第六條に該當するものであります。兩條例に於ける此等の規定に見られる差異は、ニュルンベルヒ條例の場合、國家の元首たると政府各省の責任官吏たるとを問はず被告等の公的地位は其の責任を解除し又は課刑を軽減するの理由と看做されず、唯、被告が政府又は上官の命令に從って行動した事実のみが軽減の理由と看做されるに反し、東京條例に於ては公的地位及び命令遵守事実の兩者共に、裁判所が正義の要求にかなふものと判定する場合軽減の理由となるところにあります。

(三六) さて、檢察側は其の論告に於て、「被告を次の三種に分類することが出來る。即ち(一)日本の法律の定むる所に依り政策々定に對する最終の義務

又は責任を有してゐた被告、(二)最終の義務又は責任を有してゐなかったけれども、日本の法律の定むる所に依り従的又は中間的資格に於て政策々定に對する義務又は責任を有してゐた被告、(三)日本の法律の定むる所に依り義務又は責任を有してゐなかったけれども其の爲したる行動及び声明により自分自身を政策々定者と同一水準に置きしため事実上責任を負はせらるべき被告」(三十九)と云はれて居ります。第一種に属する被告に関しては、日本の法律に従ひ又國際法に於ても正當視されるものと善意且妥當に信じて爲された彼等の行爲が違法性の認識を阻却し、従て刑を免除せらるべきものであることを既に論述致しました。

(四十) 記録第四〇五四二―三頁

(三十一) 加ふるに、一九二八年以來の十七年間に存在してゐた様な状況の下に於て、何人と雖も假りに被告等の中、何れかの代りに其の任に当ったなら

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ば、被告の実際になしたと反対のことはやり得なかつたであらうと云ふことを申立てます。実に被告等として内外に於ける永年鬱積した國民感情の連續的爆発を留めることは人間的に不可能でした。又、満洲中國其他の遠隔地に於ける多数の下僚に對し直接なる指揮監督をなすことも人間的に不可能でした。要するに、被告等に對して、國家的運命の狂瀾を既倒に返し又、血腥い戦闘の不可避的結果を豫防し得る程に、彼等の権力と注意とを行使せんことを望むのは、人間として余りなことではありませんか。

(三九)さて、第二種の被告に関しては、日本に於て官吏服務紀律(四二)といふものがあります。即ち、「第一條　凡ソ官吏ハ天皇陛下及天皇陛下ノ政府ニ對シ忠順勤勉ヲ主トシ法律命令ニ從ヒ各其職務ヲ盡スベシ。

第二條　官吏ハ其職務ニ付本屬長官ノ命令ヲ遵守スベシ。但命令ニ對シ意見ヲ述ブルコトヲ得」

との規定であります。軍人の場合に於ては更に特殊嚴格な奉公の義務が課せられ、上官の命に反抗し又は服從せざるものは陸軍刑法（第五七條乃至第五九條）、海軍刑法（第五五條乃至五七條）に依り抗命罪として嚴重な處罰を受けねばならなかったのであります。

（甲三）法廷證第三、五一の號、記錄三四、〇〇三頁

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(平) 何れにせよ、一旦上官が決定をなし又は命令が発せられた場合には、文官も軍人も其の私的意見はともあれ、之にそむく行動をとることは許されなかつたのであります。之に反する行為をなすことを彼に期待するのは誠に不可能でありました。國務大臣或は各軍又は艦隊司令官と雖も、此の意味に於ては天皇の下僚であります。若し奉勅命令が下されるならば、彼等は之に従ふ外、途はありません。さればこそ直接上奏をなし得る陸軍参謀総長又は海軍軍令部長が軍事上のみならず政治上にも多大の勢威をもつてゐた理由は茲に存するのであります。

(平) 假りに議論の為め、日本の政界又は軍部の誰かに國際法或は國内法による刑事責任が存在すると想定しても、どの個人又はどの團体に右責任を歸属せしむるかと云ふことになると不可能に近いのであります。それは蓋し二十世紀の日本に於ては第一次大戦後の独逸の歴史に見らるゝ如き陰謀

革命其他の不法手段によって何人も政府内に勢力を得たものがないどころか、官職の一つさへも得るに成功したものがないからであります。総ての陰謀や革命の計画は未前に防止されるか或は鎮圧されました。誰が之を防止又は鎮圧したかと云へば、現在此処に控へてゐる被告たちなのであります。彼等は何れも其の経歴の当然な結果として且日本の法律及び慣習に従ひ其の職に任ぜられたものであります。彼等の何れも、其の職の定むる権限を超えたとか義務を怠ったとか云ふものはありません。えより彼等は日本の政治的構成に於て上層部に属してゐたことは確かでありますが、同時に証拠の示す所によれば、彼等の中にヒットラーもなければ「我が闘争」の記もなく、まして又ナチの如き独裁党も存してゐなかったのであります。

(罒) さて、第三種に属する被告に関しては、彼等の有してゐたいくばくの人気や勢力は政府や軍部から得たものでなく、一般市民より由来したもの

であります。彼等は日本の政治上に其の意思を強行し得る程、勢威を得たことは一度もなかつたのです。せいぜい、当時羽振をきかしてゐた官僚に反抗せんとする輿論を反映した位のことでした。或は彼等として大東亜共栄圏とか亜細亜人の亜細亜とかを夢見てゐたかも知れませんが、中國に於ける全國的排外運動に比較すれば兒戯に類する議論に過ぎません。若し後者がリットン報告によるも國際的犯罪として取扱はれないならば、何故前者のみを非難すべきでせうか。若し言論の自由が國内法に於ける人権の一つであるならば、何故、國際法は之を抑止せんとするのでせうか。

(豊) 前記三種の被告たちを訴追せんとする檢察側の考へ方を基礎付けてゐるものは、國家が擬制的存在であり之に刑事上の責任を帰するわけにゆかぬとする理念であります(四十三)。首席檢察官によれば、「國家自体は條約を破るものでなく、又公然たる侵略戦争を行ふものでもない。責任は

常に人間と云ふ機関に在る」（四十四）とし、又「凡ゆる政治は人間の手に依って行はれ、総ての犯罪も亦人間に依って犯される。個人の公的地位と云ふものは彼をして個人たることを失はしめるものでもなければ又彼の個人的不法行為に対する責任から逃れさせるものでもない」（四十五）とされてゐます。斯かる考へ方は「法人には犯罪能力なし」とする法諺に従ってゐるのでありませうが、ケニー教授に依れば「今日に於ては、法人が法人の名の下に所轄裁判所へ起訴せられ、その結果法人財産に対し罰金を科せられると云ふことは既に法律の定まるところである」（四十六）と云はれて居ります。

（四十三）ジャクソン検事、「ナチ戦犯事件」一九四六年、八二頁
（四十四）キーナン氏、冒頭陳述、記録四七三頁
（四十五）キーナン氏、記録四三四―四三五頁

（四十六）　ケニー、前掲、六五ー六六頁。

（四七）　英國に於ては、一八八九年解釈條例（ヴィクトリア、五二乃至五三年度第六三号、第二條）が、起訴又は即決処分により処罰せらるべき犯罪に関する成文法の解釈に当つて、「人」なる語は反対の意思の現はれてゐない限り、法人を含むものと定め、米國に於ては、一八八二年の紐育刑法（第十三條）が、凡そ法人にして自然人に付き自由刑のみに該るべき罪に因り処罰せらるべき場合、軽罪なるときは五百弗以下、重罪なるときは五千弗以下の罰金に処すとし、一九一一年のカリフオルニア刑法（第二六條）も、法人は自然人と全様に犯罪を為す能力ありと定めて居ります。

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教科書に依れば、斯かる立法は次の如く説明されてゐます。即ち、「マーシヤル判事の言を藉れば、法人は「一個の擬制的存在で眼に見えず、唯法律の思考にのみありうるものである」とする理論の下に於ては、法人が

罪責に任ずべきものなりや否やは疑はれたものであつた。近代の學説は法人を目して、一個の実在とし、或る目的の為めに法人格を與へられ、法律上の一個体として行為することを法律によつて権能づけられて居る人間の一團と做す傾向にあるL（四十七）と説き、更に「行為が法人の権力の歸属する取締役又は役員に依つて認可されたものなるときは、取締役又は役員の意思は法人の意思と看做さるべきものである。法人の取締役又は役員は自然人たる本人に対する代理人以上の者である。彼等は法人に同化し、而して法人の活動に必要なる心的要素を供給するものであるL（四十八）と述べて居ります。

（四十七）クラーク、マーシャル「刑法論」第四版、一九四〇年、一四〇―一四三頁

（四十八）仝前、一四〇頁

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(五) 法人が國内法に基き法人格を有するに対し、國家が國際法及び國内法に依り法人たることは疑いないところであります。或る経済的又は社会的結合によって出来上ってゐる團体に過ぎない法人が実在であり、刑事責任を執り得るものならば、何故に國家が法人以上に実在であり能力を有するものではあり得ないのでせうか。ハックワースに依れば、「ステート及びネーションと云ふ言葉は屢々同義に用ひられてゐるが、厳格に云へば、ネーションの語は其の語原へ生れる」が示す通り、発生又は起原の関係を云ひ、言語及び習慣の共通社会により通常特徴付けられてゐる同一民族を意味する。ステートの語は更に特別の意義として、國際的に、一定の領土を永続的に占有し、共通の法及び習慣により政治團体を結集し、組織的政府を有し、他國との交際をなすことの出来る人々の一團を云ふ」と(四十九)。

(四十九) ハックワース、前掲、第一巻、四七頁、

(四六) 法人は其の主権を行使し得る土地も人民も有することなく、比等を結合する自然的近似性をも持つてゐず、唯、何時でも変更又は抛棄し得る特種の目的を存するのみである。然るに、國家は運命付けられた存在であり、何人と雖も、例へば十七年間に相次いで起つた十七の内閣でさへも、之を変更し抛棄することを得なかつた道程を辿るものである。株主は其の好き時機に於て法人の株を売却することが出来るが、被告等は其の國家による課せられた彼等の義務より逃げ出すことは出来なかつたのである。國際的の義務は國家の名の下に依るのみならず、國家の運命的に定められた道程に依つて履行せられ或は違背せられるのである。若し國家が戦争に敗れば、償金を支拂ふか領土を割譲することになる。斯様な措置は國際法にかける國家の責任に対する刑罰ではないのでせうか。國家の主権が國際法

の制約下にありとしても、國際法に於ける責任は如何なる個人にも直接に歸屬せしむべきではないと云ふことを次の理由により主張するものであります。

(甲) 一九四七年日本法律第一二五号、即ち國家賠償法と称するものヘ第一條ヽは次の如く定めて居ります。

即ち、

「國又は公共團体の公権力の行使に当る公務員が、その職務を行うについて、故意又は過失によって違法に他人に損害を加えたときは、國又は公共團体が、これを賠償する責に任ずる。

前項の場合において、公務員に故意又は重大な過失があったときは、國又は公共團体は、その公務員に対して求償権を有する」

と云ふのであります。之は日本の法律及び政治制度を民主化せんとする目的のため立法されたものでありますが、然も、公務員がその公務執行に

除し違法に與へた損害に付き、被害者より右公務員に対する直接の請求権を認めて居りません。此の解釈は、公法附則が一九四七年十月二十七日以降、公証人法第六條、戸籍法第四條、不動産登記法第十三條、及び民事訴訟法第五三二條を廃止した事実により確認することが出来ます。此等の規定は、公証人、市町村長、登記官吏又は執達吏がその故意又は重過失により損害を受けた者に対する直接の責任を定めたものでありました。

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(26) 他方に於て、一九二一年のジョンストン対ペドラー事件に関する英國上院の判決に際し、フィンレイ子爵は次の如く述べて居ります。即ち「英蘭にも適用せらるる我が國の既定法として、身体財産に対する不法行為に付ては、不法行為者は皇帝の命により之が為さゞれたと云ふ抗弁を出すことは出来ない。皇帝に不法行為を為すを得ず、又不法行為上の訴追をさゝれることがないのであう、一為をなした者が、他の一般私人と全

じく、損害賠償の責に任ずるのである。然かも此の法則は、外國に於て外國人に対し為された行為の場合に、制限を受ける。若し斯かる場合英國の裁判所に訴訟が提起さるるなら、被告は、行為が英國政府の命により為されたこと、又は行為の後、英國政府が之を追認したことの抗弁をなし得る。此の場合、その行為は國家の行為として、國内裁判所が判定し得ないものと看做さるるのである。損害を蒙った外國人はその所属國政府を通じ外交其他の手段により英國政府に救済を求めねばならぬ。此の原則は一八四八年の有名なビュロン対デンマン事件(エクスチェカー、二巻一六七頁)により確立されてゐる」(五十)と云ふのであります。

(五十) 控訴事件 二巻、二六二、二七一、二七二、二七五頁、ハッ・クワース、前掲、オ二巻、一六頁に引用。

(五九) フィンク対内務大臣事件に於て、原告は一九一四年十月前、埃及カイ

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の書籍商でありましたが、その敵産の没収及び使用人の捕縛並に追放による損害賠償を埃及政府に請求し、その理由の一つとして、一九一四年八月六日の埃及政府閣議決定が、英國と交戦状態にある國の侵略に対し埃及の防衛を英軍司令官に依頼したのは無效であると申立てました。埃及混合裁判所のカイロ才一審裁判所は右損害賠償の請求を棄却し、理由として、閣議決定は埃及と独逸との交戦状態に基いて為されたものであること、宣戦布告は法律上、主権の行為であること、主権者の有する右権限は其の國務大臣により行使せられること、従つて、右決定はえを為すべき権限ある唯一の当局者により為されたものであること、法律上、此の種の行為は「國家の行為」と称せられ、原則としてこれより生ずる損害に関しては賠償を求むる訴訟原因となり得ないことを言渡したのであります（五十一）。

（五十一）　埃及混合裁判所報告十五巻（一九二四年十一月―一九二五

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年十月)、八二頁 國際法英國年鑑(一九二五年)、二一九頁、ハックワース、前掲、オ二巻、一九頁に引用。

(弄) 此の國家行為なる原則は、民事たると刑事たるとを問はず、異る筈がありません。一九〇七年海牙オ四條約の前文(オ三條)に依れば、交戦者にして陸戦法規慣習に関する規定を侵すものは必要に應じ賠償の責に任ずべく、その軍隊を構成する人員により為される総ての行為に付き責を負ふことになつてゐます。一九三四年の「國際法上の海賊に関する」事件の判決によれば、「國際法により定められた犯罪を審理し処罰することは國際法として其の手段を有してゐない。」此等が犯罪を構成するとの認定及び犯人の審理並に処罰は各國の國内法に委ねられてゐるのである」(五十二)と云はれて居ります。

(五十二) 控訴事件、五八六頁、五八九頁、ハックワース、前掲、オ

一巻、三八頁に引用。

(五) されば、假りに、被告等が其の公務執行につき故意又は重過失の罪ありとするも、國際法上の通説は総て、彼等が外國又は外國人に対し如何なる責任をも直接に負ふものとは認めないのであります。然らば、國法に従ひ、又國際法の現行法規に合致せることを眞実妥当に確信して公務を執行した彼等に、どうして國際法上の責任が課せられるのでありませうか。茲に於て、國際司法常設裁判所條例(オ三八條)を引用したいと存じます。即ち、「裁判所ハ、左ノモノヲ適用スル。(一)訴訟当事國ニヨリ明カニ認メラレタ法規ヲ設定セル特殊又ハ一般ノ國際條約。(二)法トシテ認メラレタ一般慣習ノ証拠トシテノ國際慣例。(三)文明國ニヨリ認メラレタ法律ノ一般原則。(四)オ五七條ノ規定ニ従ヒ、法則決定ノ補助手段トシテ、各國ノ最高學者等ノ判例及ビ學説」右ノ規定ハ、当事者が合意セル場合、裁判

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所が衡平妥当ノ趣旨ニヨリ判決ヲ為スコトヲ妨ゲナイ」と云ふのであります。

(三) 若し先例なきに拘らず(五十三)如何にしても此等の被告を其の公務としで為したる行為に付き、國際法上直接に裁判せねばならぬものであるならば、裁判所は「文明國ニヨリ認メラレタ法律ノ一般原則」、殊に刑法に於ける上述の基本的原則を、考慮に入れて載きたいと云ふのが、私の念願であります。ホルヅワース教授は「原始人は文明國に似てゐる」と批評され、古代の刑法と今日の國際法とを比較されてゐますが、当法廷により適用せらるべき國際法は、近代文明國の刑事立法により発展せしめられた法律感覚に決して背反しないものであらうことを私は確信するものであります。

以上

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